IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

Appeal No. 822 of 2004

Aarohee Estate Developers Pvt Ltd... Appellant
vs
Indian Oil Corporation Limited... Respondent

Mr.Shailesh Shah i/b Mr Hemant Sethi for the appellant
Mr.A.Bookwala i/b Malvi Ranchoddas and Co for the respondent

CORAM: A.P.SHAH & S.J.VAZIFDAR JJ.

Dated 3l.3.2005

P.C:

l. This is an Appeal against the judgment and order of D.K.Deshmukh J. whereby the Award passed by the sole Arbitrator was set aside in a Petition under section 34 of the Arbitration and Conciliation Act, l996 (hereinafter called the Act). The facts leading to the Appeal are that on 2nd September, 1996, the first Respondent and Appellant entered into a works contract in respect of sand blasting and painting of 11 tanks at Hazira Terminal of the first Respondent as per the specifications mentioned in the works order dated 5th February, 1996 and on terms and conditions mentioned therein. The total contract value was Rs.1,06,25,602=72 (after rebate offered by the

Appellant for reduction in the guarantee period).

2. Under the contract the paint was to be supplied by M/s.Jenson & Nicholson (India) Ltd. An Indemnity Bond in respect of the said work was executed in favour of the first Respondent by the Appellant jointly with M/s.Jenson & Nicholson (India) Ltd. Under the said Indemnity Bond, the Appellant had agreed to repair any defect in painting system that arises during the guarantee period of 48 months for full exterior and interior and of 36 months from inside pontoons at no extra cost to the first Respondent. Under the Indemnity Bond, the liability of the Appellant was excluded in the course of deterioration or damage to the painting systems not caused by wear and tear, but caused due to any of the following reasons on the coated surfaces :

a) Welding,
b) Undertaking other heating,
c) Mechanical damage,
d) Fire,
e) Erosion
f) Coating area on which repairs or other works have ben performed by the Respondent after

accomplishment,

g) Deterioration of coating system caused by physical abuse such as on walkways, handrails, ladders, etc. Under the contract even final payment was to be made upon completion of the work.

3. The Appellant completed the work by about 15th November, 1997 and joint measurement was taken on 27th December, 1997 After the joint measurement, the final bill was prepared and signed jointly by the first Respondent and Appellant (except the last page thereof was not signed by the first Respondent) on 28th March, 1998 for Rs.19,28,430=46 ps. However, before final bill dated 28th March, 1998 could be considered, the first Respondent called upon the Appellant to rectify all defects, some of which were mentioned in the first Respondent's letters dated 17th January, 1998, 14th June, 1998, 17th June, 1998 and 4th August, 1998. It appears that the Appellant did not take steps to rectify the defects nor replied to any of these letters. In the meantime on or about 27th April, 1998, the Appellant submitted a revised final bill and claimed from the first Respondent a sum of Rs.5,86,15,381=07 ps., inter-alia on the ground that the first Respondent

had carried out extra items of work.

4. The contract contained an arbitration clause and the differences and disputes between the parties were referred to the sole Arbitration of the second Respondent. Before the Arbitrator, the Appellant has made a claim for Rs.11,83,91,443=75 ps. against the first Respondent. According to the Appellant, a sum of Rs.5,86,15,381=07 ps. is due and payable by the first Respondent to the Appellant in respect of the final bill and the sum of Rs.39,15,216/- is due and payable for damages suffered by the Appellant. The Appellant has claimed a sum of Rs.5,58,60,864=68 ps. by way of interest. The first Respondent denied its liability in respect of the claim made by the Appellant and has made counter claim of Rs.1,72,727=52 ps. against the Appellant and has also claimed interest on the said sum of Rs.1,72,727=52 ps. It was the case of the first Respondent that the Appellant had not rectified the defective painting and the first Respondent had to carry out the work of repainting of tanks 1 to 9 by incurring the costs of Rs.21,55,275/-. Claiming the set off in the sum of Rs.19,82,547=48 ps. from the said sum of Rs.21,55,275/-, the first

Respondent has made a counter claim of Rs.1,72,727=52 ps.

5 The Arbitrator has made his award on 19th June, 2002 whereby the first Respondent has been ordered to pay to the Appellant a sum of Rs.19,82,547=48 ps. together with interest thereon at the rate of 15% p.a. from 1.4.1998 till 19.7.2000 and thereafter at the rate of 12% p.a. from 20.7.2000 till payment and/or realisation. The Arbitrator rejected the set off and the counter claim of the first Respondent. The Arbitrator also ordered the first Respondent to pay to the Appellant a sum of Rs.1,74,620/- as costs of the arbitration.

6. The award of the Arbitrator was challenged by the first Respondent before the learned single Judge in Arbitration Petition No.367 of 2002 under Section 34 of the Act. By the impugned order, the learned single Judge set aside the award mainly on the ground that the Arbitrator apart from considering the irrelevant material and omitting from the consideration relevant material, has totally misdirected himself in recording the finding in favour of the Appellant for rejecting the counter claim submitted by the first

Respondent. The learned Judge held that the finding has to be set aside and the award made by the Arbitrator for making payment to the Appellant as per final bill can also not be sustained, because consideration of the claim and the counter claim has to be at the same time.

7. Mr.Shah, the learned counsel appearing on behalf of the Appellant strenuously contended that reasonableness of the reasons given by the Arbitrator cannot be challenged and appraisement of evidence by him cannot be a matter and ground for interference under Section 34 of the Act. The learned counsel urged that the jurisdiction to decide the objection raised by the first Respondent against the arbitral Award is limited as expressly indicated in the Act. The learned counsel submitted that the report of the Project and Development India Ltd. and the photographs produced by the first Respondent themselves show that welding work had been done after the painting work was completed by the Appellant which absolved the Appellant under the Indemnity Bond. The learned counsel submitted that it is settled law that Arbitral Tribunal is not required to follow

technical rules of evidence in terms of Evidence Act. The Award therefore could not have been set aside simply on the ground that the said two documents were not exhibited more so when it was not even the ground taken by the first Respondent in the arbitration petition.

8. Mr.Bookwala, the learned counsel appearing on behalf of the first Respondent on the one hand submitted that while the Arbitrator considered the material which was not admitted in evidence, the oral evidence led by the first Respondent has not at all been considered by the Arbitrator. Further, according to Mr Bookwala the Arbitrator for making the award, specially for rejecting the counter claim submitted by the first Respondent, has considered irrelevant material and has excluded from his consideration the relevant material. He submitted that by rejecting the counter claim for non-existent reasons, the Arbitrator has directed the first Respondent to pay the amount to the Appellant which was withheld by the first Respondent because of counter claim.

9. We have given our anxious thought to the rival submissions made by the learned counsel for the

parties and in our considered opinion no interference is called for with the order of the learned single Judge. The counter claim was made by the lst Respondent on the basis of the Indemnity Bond executed jointly by the Appellant and M/s Jenson and Nicholson (India) Ltd. The lst respondent had produced on record several letters whereby the Appellant was called upon to remove the defects in the painting works. There is no dispute that no steps were taken by the Appellant to remove the defects. In support of the counter claim, the first Respondent had examined three witnesses. The tender of Polycoates for Rs.21,55,275/- for repainting of exterior surfaces of tank 1 to 9 was also produced.

l0. The appellant filed the reply to the counter claim denying the liability to carry out the repairs as per the Indemnity Bond. In the reply, it was not the case of the Appellant that he was not liable to carry out the repairs as the matter falls in any of the excluded categories . No such case was also made out in the claim submitted by the Appellant. It appears that the first Respondent produced on record a report from the Project and Development India Ltd. along with

photographs of the exterior portion of the tanks. Both the documents were not admitted in evidence by the Arbitrator himself. In fact the Arbitrator observed in paragraph 22 of the award that the report of the Project and Development India Ltd. only gives probable reasons for deterioration of paint and it is only guesswork. However, the Arbitrator then proceeded to make a completely new case for the Appellant that the defects in the work fell in excluded category and for this purpose the Arbitrator merely relied upon the photographs which he refused to admit in the evidence. On the basis of the photographs, the Arbitrator observed that there is no clinching evidence to establish that the iron brackets admittedly put at the exterior of the said tanks were not put after the painting to the said tanks was carried out by the first Respondent and if the said brackets are put after the Appellant carried out painting to the said tanks as stated by the Appellant, the cause for deterioration of painting is obviously rusting of paint from such iron brackets as is visible from the photographs produced by the first Respondent and the Appellant cannot be held liable or responsible for the same. In absence of any pleadings either in the claim petition or in the

reply to counter claim by the Appellant for bringing the case within the excluded category, the Arbitrator has committed serious illegality in holding that the case falls in excluded category in the Indemnity Bond.

ll. It is also seen from the record that in absence of the oral evidence led on behalf of the Appellant, the Arbitrator has elevated the submissions made by the representative of the Appellant to the level of the oral evidence and has relied on the submissions as if that is evidence led before the Arbitrator for rejecting the counter claim submitted on behalf of the first Respondent. The Arbitrator has also observed that there are no deficiencies to be found in the work carried out by the Appellant because the final bill was sanctioned by the first Respondent. It is pertinent to note that the counter claim of the first Respondent was based on the indemnity period, which begins after completion of the work and the indemnity is taken to see the performance of the work over a period of time after its completion. The indemnity comes into play if the deficiencies come to light after lapse of certain time and the indemnity relates to such deficiencies which may not be visible when the

work is completed. It is also seen from the record that the Arbitrator has merely referred to the oral evidence, without discussing this evidence and his finding is based solely on the basis of the oral submissions made by the representative of the Appellant which are not supported by the pleadings. In these circumstances, the learned single Judge was right in holding that the award suffers from complete non-application of mind.

l2. We do not find any infirmity in the reasonings of the learned single Judge. Therefore Appeal is dismissed.